U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 15 January 2004

CASE NO.: 2003-ERA-00031

IN THE MATTER OF

SYED M. A. HASAN,
Complainant

v.

ENERCON SERVICES, INC.,
Respondent

APPEARANCES:

SYED M.A. HASAN
Pro se Complainant

TERRY M. KOLLMORGEN, ESQ.
On behalf of the Respondent

Before: LARRY W. PRICE
Administrative Law Judge

RECOMMENDED DECISION AND ORDER
(Granting Summary Judgment and Denying Complaint)

This case arises under the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 et seq., and the regulations promulgated thereunder at 29 C.F.R. Part 24. This statutory provision prohibits an employer from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions or privileges of employment because the employee engaged in activities to carry out the purpose of the statute.

PROCEDURAL HISTORY

The ERA claim in this case is brought by Complainant Syed M.A. Hasan against Respondent Enercon Services, Inc. Complainant alleges that Respondent did not hire him as a civil/structural engineer because of his engagement in protected activities. On May 21, 2003, Complainant filed a complaint with the Department of Labor (DOL) alleging that Respondent had discriminated and retaliated against him for his prior whistleblowing activities by refusing to hire him for available engineering positions for which he was otherwise qualified. On September 12, 2003, after conducting an investigation, the Occupational Safety and Health Administration (OSHA) determined that Complainant's complaint had no merit. On September 23, 2003, Complainant timely filed a request for hearing.

This matter was referred to the Office of Administrative Law Judges for a formal hearing. Pursuant thereto, on September 25, 2003, a Notice of Hearing and Pre-Hearing Order was issued scheduling a formal hearing for October 28, 2003, in Huntsville, Alabama. On October 9, 2003, Complainant filed a motion to compel and a request to change the hearing date. On October 17, 2003, the Court granted Complainant's motion to compel and rescheduled the hearing for December 1, 2003, in Huntsville.

On October 23, 2003, Complainant filed a motion to modify the Court's previous order to compel discovery from Respondent, as Complainant now requested that Respondent produce any information on employees hired since November 23, 2002. Complainant also filed a motion to amend his original ERA complaint to cover the time period from November 23, 2002, through the time of the hearing. On October 29, 2003, Complainant filed a motion for summary judgment and a motion to disqualify Respondent's attorney and his law firm from the case. Complainant alleged that Respondent's attorney was guilty of suborning perjury in eliciting affidavits from two of Respondent's employees. On November 12, 2003, the Court issued an order denying Complainant's motion to modify, motion to amend, motion to disqualify opposing counsel and motion for summary judgment.

Respondent filed a motion for summary judgment on November 18, 2003. On November 21, 2003, Complainant submitted a letter requesting various forms of relief from the Court. On December 4, 2003, the Court denied, *inter alia*, Complainant's motion for default judgment and Complainant's motion for reconsideration as to certain discovery matters. The Court also ordered Respondent to provide Complainant with a certain document and ordered Complainant to respond to Respondent's interrogatories. On December 15, 2003, Complainant filed a response in opposition to Respondent's motion for summary judgment. On January 5, 2004, Respondent filed a reply. On January 12, 2004, Complainant filed a response to Respondent's reply. Complainant again moved for disqualification of Respondent's attorney and renewed his motion for default judgment against Respondent. Because Complainant offered no new evidence to

substantiate either of these previously denied motions, the Court hereby denies the motion for disqualification and the motion for default judgment. Because the materials submitted demonstrate that there is no genuine issue as to material fact, summary judgment is appropriate in this case.[1]

FINDINGS OF FACT

I find the following facts are undisputed based upon the briefs and supporting evidence submitted by both parties:

1. Complainant is a civil/structural engineer with over twenty-three years of experience in the United States nuclear industry in a variety of different areas and positions. (RB Ex. A; CR p. 4). In 1999, while working for another nuclear industry employer, Complainant raised some safety concerns with the United States Nuclear Regulatory Commission (NRC). The NRC's investigation into those concerns ultimately substantiated the issues that Complainant raised. (DOL Complaint, pp. 6-8).

2. Respondent is an engineering consulting firm which provides licensed and non-licensed engineers, technicians and other personnel to entities in the nuclear and other power generating fields. When a client requests Respondent's services, Respondent performs a search to match the capabilities and availability of its employees to provide the service. Respondent typically reviews a listing of current employees for the requisite criteria; if no current employees meet the criteria, Respondent reviews other candidates to find a match for the client. (RB p. 1).

3. Respondent provides services for First Energy, a client company which operates the Perry Nuclear Power Plant (Plant) in Ohio. (RB p. 1; RB Ex. B, p. 1; CB p. 11). In February 2002, Respondent received a task authorization from First Energy to perform a review of engineering calculations at the Plant. (RB p. 1). First Energy later contracted for Respondent to perform a series of additional work assignments, both at the Plant and in Respondent's office in Mount Arlington, New Jersey. (RB pp. 1-2).

4. Respondent's process for providing services to First Energy generally involved several steps. To begin with, First Energy would identify a prospective need, either to perform a specific work scope or to provide an individual with specific skills for a specific task. First Energy would then communicate this

[1] The following abbreviations shall be used when citing materials: Respondent's Brief—RB; Complainant's Brief—CB; Respondent's Reply—RR; Complainant's Reply—CR; exhibits of either party—Ex.; Complainant's Department of Labor Complaint—DOL Complaint.

potential need to Respondent via Ken Whitmore, a senior civil/structural engineer in the Mount Arlington office. Mr. Whitmore would research the request and then communicate the request to Rick McGoey, the director of Respondent's Mount Arlington office. After First Energy's management formalized the request, a formal request for engineering services was issued to Respondent. Respondent would then search for current full or part-time employees to fill the positions. If no current employees were available, Respondent would attempt to fill the positions with individuals outside of the company. (RB Ex. B, p. 2; RB Ex. C, pp. 2-3). Respondent had professional recruiters responsible for the search and recruitment of industry personnel. When a need was identified, the recruiters searched for and provided resumes of potentially qualified individuals. This process was managed through a recruiting activities report. (RB Ex. C, p. 3 n.1).

5. After a proposal was generated, it was presented to Respondent's management for approval, after which it was presented to First Energy for consideration. Respondent sometimes submitted formal written proposals, but usually, the proposal was in the form of an informal verbal communication from Mr. Whitmore to First Energy's management. In any case, the proposal included the resumes of individuals proposed to do the requested work. First Energy would review the proposal, and if it was accepted, First Energy would authorize Respondent to provide the service needed. Upon receiving authorization, Respondent would either make the resources available or obtain the resources through a hiring effort. If Respondent needed to hire someone not currently employed by the company, Respondent's management would formally approve and authorize the preparation of an offer letter, which served as the official and the only manner of receiving an employment offer. Employment did not begin until Respondent's receipt of the prospective employee's acceptance of the offer letter. At that point, the work would be performed according to First Energy's authorization, and the project would be terminated upon completion. If temporary employees were hired for the task, their assignment with Respondent would end and they would be terminated, unless other work opportunities became available. (RB Ex. B, p. 3; RB Ex. C, pp. 3-4).

6. Respondent initially received Complainant's resume in response to a specific task request from the civil/structural performing ANSYS analysis management at the Plant, which involved analysis of a steel platform using ANSYS, a specialized finite-element structural analysis program that is unrelated to STAAD or STRUDL. Because the platform analysis had to be completed in a short amount of time, the job required an individual with extensive knowledge of and experience with ANSYS.

7. Since Complainant's resume did not indicate any knowledge of or experience with ANSYS, Dr. Steve Tuminelli, who worked in Respondent's Mount Arlington office, conducted a telephone interview with Complainant in mid-December 2002. (RB p. 2; RB Ex. A). During the interview, Complainant confirmed that he did not have the requisite experience with ANSYS. (RB p. 2). Respondent therefore concluded that Complainant lacked the requisite qualifications for the platform analysis job. (RB pp. 2-3).

8. Complainant explained to Dr. Tuminelli that many of the companies where he was formerly employed used finite-element programs which were similar to ANSYS. Complainant further explained to Dr. Tuminelli that because he had over twenty-five years of experience with these other programs, he would easily be able to use the ANSYS program by following the user manual. (CB p. 8).

9. On January 10, 2003, Respondent hired Folgu J. Nag, an individual who did meet the qualifications for the ANSYS position. (CB p. 6; RB Ex. C, p. 4; RR Ex. A). In 1989, Complainant had worked as an independent reviewer, reviewing the work of Mr. Nag. According to Complainant, Mr. Nag had knowledge of his whistleblower status as of 1989. (CB p. 7). At that time, Complainant had an ERA whistleblower complaint pending against System Energy Resources, Inc., which is now called Entergy Corporation and is a client of Respondent. (CR p. 5).

10. With regard to the ANSYS position, Mr. Nag was hired as a temporary employee and was released after the work was completed. (RB Ex. C, p. 4). Respondent retained Complainant's resume for consideration of future positions. (RB p. 3). Complainant's resume contained no mention of any alleged ERA protected activity, nor had Complainant mentioned any protected activity during his phone interview with Dr. Tuminelli. (RB p. 3; RB Ex. A).

11. On January 13, 2003, Respondent hired an individual named Juan J. Vizcaya for a senior civil/structural engineering position. (RR, pp. 1-2). As compared to Complainant, Respondent considered Mr. Vizcaya to have superior qualifications, experience and background. Respondent took into account several factors when hiring Mr. Vizcaya, including his education level, seniority and years of experience, technical quality of work, written and verbal communication skills, flexibility to perform diverse assignments, initiative and contribution to "get the job done," ability to contribute to Respondent's business development, cost-consciousness, proximity to the Mount Arlington office (enabling Respondent to avoid relocation costs) and basis for demonstrated performance. (RR Ex. B, pp. 2-3). In addition, Mr. Vizcaya was

highly recommended by two former co-workers, and Respondent gives great weight to recommendations from reliable reference sources. (RR Ex. B, p. 3).

12. Between January 13 and 16, 2003, Donna Haviland, First Energy's civil/structural manager, contacted Mr. Whitmore to see if Respondent could provided an individual to work at the Plant during the spring 2003 refueling outage in a "temporary outage" position. This individual would serve to augment the Plant's civil/structural staff and would be responsible for a wide range of activities that might arise during the outage. The position responsibilities included direct interface with different groups at the Plant solving problems, coordinating the activities of various individuals and groups, performing 50.59 safety evaluations, reviewing design packages, resolving technical issues and addressing various licensing issues and potential safety operability concerns.

13. During the week of January 13, 2003, Mr. Whitmore contacted the Mount Arlington office to determine whether there were any individuals available for the Plant position. (RB p. 3). At that time, none of Respondent's full-time employees were available. (RB pp. 3-4). Two temporary employees, Leon Whittle and Jerry Robillard, had the requisite skills and were "known performers" for Respondent, but it was unclear whether either of these men was available for the job.

14. Because Respondent was unsure as to the availability of any of its employees, additional resumes were reviewed to identify potential job candidates. In searching for individuals outside the company to fill the position, Respondent's recruiters provided Complainant's resume. On January 17, 2003, the temporary outage position was added to the recruiting activity report. Complainant, Mr. Robillard and Mr. Whittle were identified as potential job candidates on the report.

15. On January 20, 2003, once the potential candidates were selected, Mr. Whitmore and Frank Collado, the Mount Arlington office project manager, conducted a telephone interview with Complainant. Based on the phone interview, Complainant appeared to be qualified for the temporary outage position. Since the individual in this position would be working at the Plant without direct supervision and would be responsible for representing Respondent in a very demanding position, Respondent decided to conduct an in-person interview with Complainant. (RB p. 4). Respondent did not conduct interviews with Mr. Whittle or Mr. Robillard because their skills, capabilities and level of performance were already known to company personnel. (RB Ex. C, p. 6).

16. On January 23, 2003, Respondent arranged for Complainant to meet with Mr. Whitmore for the interview. (RB p. 5; RB Ex. B, p. 5; CB p. 13). During the interview, they discussed Complainant's qualifications and experience as well as the details of the temporary outage position. Complainant did not mention engaging in any protected activities under the ERA. (RB p. 5). According to Complainant, Mr. Whitmore told him that Respondent had decided to interview him because none of the company employees wanted to go to work in Cleveland. Complainant then told Mr. Whitmore that he was willing to work immediately for Respondent "at any place and for any shift and for any salary" that Respondent deemed reasonable. (CB p. 13).

17. Respondent developed a proposal to First Energy for the temporary outage position. (RB p. 5). After reviewing the available candidates, Mr. McGoey identified Mr. Whittle as the recommended candidate. (RB p. 5; RB Ex. C, p. 7). This recommendation was based upon Mr. Whittle's extensive experience and technical skills, his immediate availability and his extensive field experience at numerous nuclear power plants. In addition, managers and recruiters recommended Mr. Whittle to Respondent as a strong and capable performer. (RB Ex. C, p. 7).

18. On January 27, 2003, Complainant sent a letter to Mr. Whitmore in which he submitted his expenses incurred during the travel to and from the interview. In this letter, Complainant included an excerpt of a favorable evaluation by one of his former supervisors. Complainant made no mention of being a whistleblower. (DOL Complaint, Attachment 1, pp. 1-2).

19. On January 29, 2003, Mr. Whitmore met with Ms. Haviland to present Respondent's proposal for filling the temporary outage position. They discussed the three candidates for the job. Ms. Haviland received the proposal and Mr. Whittle's resume but told Mr. Whitmore that First Energy's need for the position had changed and that she needed to review the proposal with management. (RB p. 5).

20. On January 30, 2003, Ms. Haviland told Mr. Whitmore that management had declined to approve her request to hire a civil/structural engineer to augment the staff in a temporary outage position. Instead, First Energy had decided to complete the work with in-house resources through the use of overtime. As a result, Respondent's proposal was not accepted, and Respondent did not hire anyone to fill the temporary outage position.

21. On February 3, 2003, the recruiting activity report was updated to remove the temporary outage position at First Energy. (RB p. 6). On February 5, 2003, Mr. McGoey sent Complainant a letter explaining that there were no other job

opportunities matching his capabilities available at that time but that Respondent was impressed with his capabilities and was interested in possible employment opportunities in the future. (RB p. 6; CB p. 14; DOL Complaint, Attachment 1, p. 3). At that time, Respondent had no knowledge of Complainant's alleged whistleblower status under the ERA. (RB p. 6).

22. On February 21, 2003, Complainant wrote a letter to Respondent, addressed to Mr. McGoey and marked "Attention: Mr. K. Whitmore," in which he stated that he was willing to work for the company "at any place, for any shift and for any salary . . . deem[ed] reasonable" and requested that Respondent not discriminate against him for being a whistleblower with regard to nuclear safety issues. On March 19, 2003, Complainant wrote another letter to Mr. McGoey and Mr. Whitmore in which he once again expressed his willingness to go to work and asked Respondent not to discriminate against him for being a whistleblower. (CB pp. 14-15).

23. In the February 21, 2003 and March 19, 2003 letters to Mr. McGoey, Complainant made reference to Respondent's website advertisement seeking civil/structural engineers at various locations. (RB Ex. C, p. 8). According to Complainant, the website indicated that "immediate opportunities" existed and that Respondent had a "need for degreed and experienced engineers." (CB p. 4). According to Mr. McGoey, the advertisement was intended to attract the interest of engineers from competitors as well as job-seeking individuals. Respondent did not have a specific need for a civil/structural engineer, nor did Respondent hire a civil/structural engineer in response to the advertisement. (RB p. 6; RB Ex. C, p. 8). Instead, Respondent utilized the advertisement to create a database of qualified potential job candidates if and when positions in the industry became available. (RB pp. 6-7).

24. After sending the letters, Complainant never got any response from Respondent despite his contention that he was qualified for the positions advertised on the website. (CB p. 15). On May 21, 2003, Complainant filed a DOL complaint in which he alleged that Respondent had illegally and intentionally discriminated and retaliated against him by refusing to hire him for available and advertised civil/structural engineering positions based upon his prior whistleblowing activities under the ERA. (DOL Complaint).

25. In a sworn affidavit, Mr. McGoey stated that Complainant did not disclose his alleged whistleblower status to Respondent during his interviews or on his resume. Mr. McGoey stated that he had no knowledge of Complainant engaging in any alleged protected activity until Respondent received Complainant's DOL complaint in late May 2003. Mr. McGoey denied that

Respondent used Complainant's alleged whistleblower status as a factor in any decisions concerning Complainant. (RB Ex. C, p. 9).

26. In a sworn affidavit, Mr. Whitmore stated that he had no knowledge or information as to Complainant's alleged whistleblower status under the ERA until Respondent received Complainant's DOL complaint in late May 2003. Mr. Whitmore stated that Complainant's alleged protected activity was not a factor in any of his hiring decisions in regard to Complainant. (RB Ex. B, p. 7).

27. The undisputed facts establish that when the hiring decisions were made in December 2002 and January 2003, Respondent had no knowledge or information as to Complainant's alleged whistleblower status under the ERA.

28. The undisputed facts establish that in the time period between January 23, 2003, and May 21, 2003, Respondent did not hire any individuals in the civil/structural engineering divisions. (Respondent's Response to Request for Production of Documents, p. 3).

LAW AND CONTENTIONS

Respondent has filed a motion for summary judgment in this case. 29 C.F.R. § 18.40(d) provides in pertinent part: The administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise show that there is no genuine issue as to any material fact and that a party is entitled to summary decision."

In deciding a motion for summary judgment, the court must consider all the materials submitted by both parties, drawing all reasonable inferences in a matter most favorable to the non-moving party. Fed. R. Civ. P. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). The moving party has the burden of production to prove that the non-moving party cannot make a showing sufficient to establish an essential element of his case. Once the moving party has met its burden of production, the non-moving party must show by evidence beyond the pleadings themselves that there is a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). A court shall render summary judgment when there is no genuine issue as to any material fact, the moving party is entitled to judgment as a matter of law and reasonable minds could come to but one conclusion, which is adverse to the party against whom the motion is made. See LaPointe v. United Autoworkers Local 600, 8 F.3d 376, 378 (6th Cir. 1993); United States v. TRW, Inc., 4 F.3d 417, 423 (6th Cir. 1993), cert. denied, 511 U.S. 1004 (1994).

Prima Facie Case

Section 211 (formerly Section 210) of the ERA encourages employees in the nuclear industry to report safety violations and provides a mechanism for protecting them against retaliation for doing so. See English v. General Electric Co., 496 U.S. 72, 82 (1990). That section states in relevant part:

> (a) Discrimination against employee.
>
> (1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)—
>
> (A) notified his employer of an alleged violation of this chapter;
>
> (B) refused to engage in any practice made unlawful by this chapter . . . , if the employee has identified the alleged illegality to the employer;
>
> (C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter;
>
> (D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter . . . or a proceeding for the administration or enforcement of any requirement imposed under this chapter;
>
> (E) testified or is about to testify in any such proceeding or;
>
> (F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter. . . .

42 U.S.C. § 5851(a)(1).

Subsection (b) of this section, which was amended in 1992, sets forth specific procedures for addressing "whistleblower" complaints filed under the ERA and provides for burdens of proof unique to the ERA. This subsection provides that a complaint shall

be dismissed unless the complainant has made a prima facie showing that the behavior complained of was a contributing factor in the unfavorable personnel action alleged in the complaint. 42 U.S.C. § 5851(b)(3)(A). To establish a prima facie case under the ERA, a complainant must establish:

1) the complainant engaged in protected activity;
2) the respondent employer was aware of complainant's engagement in protected activity;
3) the respondent employer subjected complainant to an adverse employment action with respect to his compensation, terms, conditions, or privileges of employment;
4) the respondent is within the term "employer" as defined by ERA § 5851(a)(2) and
5) a nexus exists between the protected activity and the adverse employment action.

Bauer v. United States Enrichment Corp., 2001-ERA-9 (ARB May 30, 2003). In this case, it is undisputed that Complainant has previously engaged in protected activity. Complainant variously alleges that Respondent failed to hire him for an ANSYS position, a position as a senior civil/structural engineer and a temporary outage position at First Energy because of his whistleblower status. Each of these positions will be examined in turn to determine whether Complainant has established a prima facie case that Respondent discriminated against him in violation of the ERA.

ANSYS Position

Complainant in this case urges that the Court deny summary judgment. Complainant argues that he has created a genuine issue of material fact as to Respondent's knowledge of his alleged whistleblower status during the time period before he filed his DOL complaint in May 2003. Over the course of the pre-hearing process, as well as in his brief, Complainant has alleged on several occasions that Mr. McGoey and Mr. Whitmore committed perjury in their affidavits when they stated that they knew nothing of Complainant's alleged whistleblower status until they received a copy of the May 2003 complaint. It is undisputed that Complainant submitted two letters to Respondent, in February and March 2003, in which he stated that he was a whistleblower. Although Complainant has speculated that Respondent could have learned of his whistleblower status prior to receipt of these letters by virtue of conducting an internet search using his name, Complainant has provided no factual evidence to indicate that Respondent had any knowledge of his whistleblower status before receipt of the February 21, 2003 letter. Consequently, I find that there is no genuine issue of material fact as to Respondent's lack of knowledge of Complainant's whistleblowing activities prior to February 21, 2003.

Respondent initially received Complainant's resume in response to a specific task request from First Energy for an individual who had extensive knowledge of and experience with ANSYS. During a phone interview in mid-December 2002, Complainant confirmed that he did not have any ANSYS experience, although he believed he would be able to use the ANSYS program by following the user manual. Respondent nonetheless concluded that Complainant lacked the requisite qualifications for the position, and on January 10, 2003, Respondent hired Mr. Nag, who did meet the qualifications, for the ANSYS position.

As previously noted, it is undisputed that Complainant has fulfilled the first requirement of the prima facie case. In addition, Complainant suffered an adverse action when Respondent declined to hire him for the ANSYS position. As to Respondent's knowledge of Complainant's engagement in protected activity, however, Complainant has failed to establish that Respondent knew of Complainant's whistleblower status at least until February 21, 2003. It is undisputed that Complainant's resume contained no mention of previous engagement in protected activity. It is further undisputed that Complainant made no mention of his whistleblower status during the phone interview for the ANSYS position. Complainant intimates that Mr. Nag, with whom he worked in 1989, might have mentioned his whistleblower status to Respondent. Complainant has produced no factual evidence whatsoever to back up this purely speculative theory; in fact, he has not even established whether Mr. Nag in fact knew of his whistleblower status when they worked together. Complainant also speculates that Respondent could have conducted an internet search and learned of his whistleblower status. Once again, Complainant has failed to produce any factual evidence to support this speculative theory.

In sum, the undisputed facts demonstrate that Respondent was unaware of Complainant's engagement in protected activity at least until February 21, 2003, the day that he first informed Respondent of his prior engagement in protected activities. Complainant has provided no evidence to refute Respondent's claim that he was not hired for the ANSYS position because he had no background in ANSYS. I find that Complainant has failed to establish a prima facie case for discrimination with regard to the ANSYS position.

Senior Civil/Structural Engineering Position

After Respondent determined that Complainant lacked the requisite qualifications for the ANSYS position, Respondent retained Complainant's resume for consideration of future positions. On January 13, 2003, Respondent hired Mr. Vizcaya for a senior civil/structural engineering position. As compared with Complainant, Respondent felt that Mr. Vizcaya had superior qualifications, experience and background. Among the other factors that Respondent weighed in Mr. Vizcaya's favor was the fact that he lived

close to Respondent's office, such that they would not be responsible for relocation expenses if he was hired. In addition, Mr. Vizcaya was highly recommended by two co-workers, and Respondent gave great weight to these recommendations. Once again, while Complainant has established his whistleblower status and that he suffered an adverse action when he lost out on this job to Mr. Vizcaya, he cannot establish that his protected activities were the reason that he was not hired. Respondent does not dispute that Complainant was qualified for the position; it simply argues that Mr. Vizcaya was better qualified than Complainant based upon several factors. In fact, it is largely irrelevant whether Mr. Vizcaya was in fact more qualified for the senior civil/structural engineering position than Complainant, because in any case, the undisputed facts reflect that Respondent had no knowledge of Complainant's whistleblower status when Mr. Vizcaya was hired. Simply put, no matter what the reason for Respondent choosing Mr. Vizcaya over Complainant, Complainant's whistleblower status clearly had nothing to do with Respondent's decision. Accordingly, I find that Complainant has failed to establish a prima facie case for discrimination with regard to the senior civil/structural engineering position.

Temporary Outage Position

Between January 13 and 16, 2003, First Energy contacted Respondent in regard to a temporary outage position at the Plant. Respondent identified three potential job candidates for the position—two existing temporary employees and Complainant. Complainant was interviewed for this job, but Respondent did not conduct interviews with the other two candidates because their qualifications and skills were already known to company personnel. After reviewing the candidates and their qualifications, Respondent decided to recommend Mr. Whittle, one of its temporary employees, for the job, largely because it was already familiar with the quality of his work. On January 30, 2003, however, Respondent learned that First Energy had decided not to hire anyone for the temporary outage position. Respondent therefore did not hire Mr. Whittle, or anyone else, for this position. On February 5, 2003, Respondent informed Complainant that there were no job opportunities available for him at the time but that Respondent would consider him for possible job opportunities in the future. During this entire time, Respondent was unaware of Complainant's whistleblowing status, because Complainant did not mention his previous engagement in protected activities until February 21, 2003, after Respondent had already told him there were no positions available at that time. Once again, I find that Complainant has failed to establish a prima facie case for discrimination, because the undisputed facts show that Respondent had no knowledge of Complainant's whistleblower status until after it had decided to hire someone else for the temporary outage position.

It is noted as well that Complainant cannot be said to have suffered an adverse action with regard to the temporary outage position, because no one was hired for this position. While Mr. Whittle was chosen as the recommended candidate, he was never

actually hired. Thus, Complainant did not lose anything as a result of Respondent's failure to choose him as the recommended candidate, since the job itself never materialized.

Although Respondent had at least constructive notice of Complainant's whistleblower status after February 21, 2003, it is undisputed that Respondent did not hire any individuals in the civil/structural engineering divisions between January 23, 2003, and May 21, 2003, the day that Complainant filed his DOL complaint. Consequently, I find that Complainant cannot establish a prima facie case for discrimination after the date of constructive notice, as there was no adverse action taken against him during this time.

Because Complainant cannot establish that Respondent knew of his whistleblower status during the time period when it failed to hire him for the ANSYS and senior civil/structural engineering positions, and because Complainant cannot establish that he suffered an adverse employment action during the time period after Respondent was given constructive notice of his whistleblower status, he cannot prevail in this action. Accordingly, I recommend that Respondent's motion for summary judgment be granted and that the complaint in this matter be dismissed.

RECOMMEMDED ORDER

Respondent's motion for summary judgment is hereby **GRANTED**, and the complaint of Syed M.A. Hasan is hereby **DENIED**.

So ORDERED.

A

LARRY W. PRICE
Administrative Law Judge

LWP:bbd

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall

be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.7(d) and 24.8.